No. 4946

In the

UNITED STATES CIRCUIT COURT OF APPEALS

For the Ninth Circuit.

KETCHIKAN LUMBER AND SHINGLE COMPANY,
a corporation,
Plaintiff in Error,

vs.

A. WALKER,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR

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I.

STATEMENT OF FACTS.

This case comes to this Court upon a Writ of Error to the United States District Court of the District of Alaska, Division Number One, directed to a judgment entered in favor of the plaintiff in the sum of Four Thousand Eight Hundred and Fifty-two ($4852.00) Dollars. Throughout this brief we shall use the term plaintiff and defendant in referring to the parties as they were aligned in the Court below.

The action is one for compensation under the

provisions of Chapter 98 of the Session Laws of Alaska of 1923. Plaintiff on the date of injury, to-wit: April 25, 1925, and prior thereto, had been employed by defendant as an operator of a saw in the sawmill of defendant. On said date plaintiff received an injury to his right hand consisting of a cut which, the testimony shows, severed the bones and tendons of three fingers and the thumb. As a result of the injury plaintiff was in the hospital nearly two months. Prior to said injury plaintiff was in good health. After the injury and up to the time of the trial, to-wit: May 7, 1926, plaintiff testified he had not been able to perform manual labor; that his nerves were not as good as they were; that he could not rest as good as he did; that his nerves bothered him; that he had pains in his arm; that it bothered him more in damp weather; that his hand pained him and was cold nearly all the time and did not get the right circulation; that his arm pained him quite a bit in the shoulder; that he could not use the hand for anything much; that at the time of the injury he had been making approximately $134.00 a month and at the trial of the case was employed as a watchman at the rate of $100.00 a month. The three medical experts who examined plaintiff testified substantially that the condition of plaintiff was normal at the time of the trial. The doctor who treated him at the time of the injury and testified at the trial stated there

was no appreciable difference in plaintiff's appearance with reference to general health and ruggedness. The testimony of the doctors substantially was that the injury to the hand had healed and there were no manifestations of an injury to the nerves; that the plaintiff's health was normal and that the injury itself and the results therefrom were confined to the plaintiff's hand and some atrophy of the muscles in the arm; that plaintiff sustained no other physical injury other than that to the hand and arm as stated; that the use of plaintiff's hand as an implement had been destroyed to the extent of approximately 90%. Plaintiff stated he thought he would be better off had the hand been severed between the wrist and elbow, and one doctor testified that the injury amounted to approximately total loss of function of the hand as an implement. There was also medical testimony to the effect that plaintiff's hand might be rendered more useful by plastic surgery, which, however, was conjectural. This we submit is a brief statement of the testimony in the case.

II.

THE COURT ERRED IN PERMITTING TESTIMONY TO BE PRODUCED UPON BEHALF OF PLAINTIFF TENDING TO SHOW THE INJURY SUFFERED BY PLAINTIFF WAS CAUSED BY THE NEGLIGENCE OF THE DEFENDANT.

At the trial plaintiff attempted to testify that his injury was caused by the saw which he was operating becoming out of order. Counsel for defendant objected to testimony being introduced of that nature for the reason that it would be prejudicial to the defendant and stated to the Court that the defendant admitted the injury was one for which defendant was liable under the Compensation Law of Alaska. This objection was overruled by the Court and defendant excepted thereto. On this assignment of error we submit it is unnecessary to cite authorities for the reason that under the law in question the manner in which the injury occurred and especially whether due to negligence, was immaterial so long as defendant admitted liability. Thereafter testimony was received which naturally tended to prejudice the jury against the defendant.

III.

THE COURT ERRED IN REFUSING TO GRANT DEFENDANT'S MOTION FOR A NONSUIT AND INSTRUCTED VERDICT IN ITS FAVOR FOR THE REASON OF INSUFFICIENCY OF THE EVIDENCE TO SUPPORT THE ALLEGATIONS OF THE COMPLAINT AND ON ACCOUNT OF A FATAL VARIANCE BETWEEN THE PROOFS SUBMITTED AND THE PLEADINGS. (See pages 58-59.)

At the conclusion of plaintiff's case defendant

made the motion above mentioned which was overruled by the Court to which defendant excepted. It will be observed from the complaint that plaintiff's case was based on permanent total disability, wherein plaintiff prayed for judgment in the maximum sum provided for by the Alaskan Compensation Act for permanent partial disability, to-wit: $6240.00. We honestly contend that the Court should have granted the motion unless plaintiff amended the complaint to conform to the facts proven, as plaintiff did later on at the conclusion of the trial. The testimony wholly failed to support the complaint in its condition at the conclusion of plaintiff's case for the reason that plaintiff plead total permanent disability and the proof showed only partial permanent disability. This action was tried under the provisions of the Alaska Compensation Act, which provides that actions thereunder be tried the same as other actions in the District Court of Alaska. Accordingly the motion for an instructed verdict should be governed by the same rule of law as any other action and when there is a failure of proof as shown in this case, the Court committed an error in requiring the defendant to enter into its case. It will be conceded, we think, that had judgment been rendered on the testimony of the plaintiff as it stood at the conclusion of plaintiff's case, in the sum of $6240.00 as prayed for, such judgment could not have been supported by the evidence.

IV.

THE COURT ERRED IN PERMITTING THE PLAINTIFF TO AMEND THE COMPLAINT AFTER THE CONCLUSION OF THE EVIDENCE AND THE COMPLETION OF ARGUMENTS TO THE JURY, WHICH AMENDMENT SUBSTANTIALLY CHANGED THE CAUSE OF ACTION.

After the argument of the case by the attorneys for plaintiff and defendant and prior to the instructions of the Court, plaintiff, over the objection of defendant, was permitted to amend the complaint and change the same from an action based on total permanent disability to partial permanent disability. (See paragraph V of Complaint as amended at page 3, and pages 66 and 67 permitting plaintiff to amend by striking the word "totally" and in inserting the word "partially.") Section 924 of the Compiled Laws of Alaska relating to amendments is as follows:

"Sec. 924. The court may, at any time before trial, in furtherance of justice, and upon such terms as may be proper, allow any pleading or proceeding to be amended by adding the name of a party, or other allegations material to the cause, and in like manner and for like reasons it may, at any time before the cause is submitted, allow such pleading or proceeding to be amended, by striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or when the amendment does not substantially change the

cause of action or defense, by conforming the pleading or proceeding to the facts proved."

We submit that the amendment permitted by the Court to which defendant excepted came too late and actually changed the cause of action from that of total permanent disability to partial permanent disability and placed the proceedings in such shape that defendant could not have offered testimony in defense to the complaint after the cause had been argued to the jurors. The amendment at least should have been made prior to the time the arguments had been completed in order that defendant could have asked that the case be reopened to offer further evidence.

V.

THE COURT ERRED IN REFUSING TO GIVE DEFENDANT'S REQUESTED INSTRUCTION NUMBER FOUR AS FOLLOWS: "YOU ARE INSTRUCTED UNDER THE LAW OF ALASKA THAT ACCORDING TO THE EVIDENCE IN THIS CASE PLAINTIFF CANNOT RECOVER FOR MORE THAN THE LOSS OF A HAND."

THE COURT ERRED IN ENTERING THE JUDGMENT IN THE CASE OFFERED BY THE PLAINTIFF OVER THE OBJECTIONS OF DEFENDANT FOR THE REASON THAT THE JUDGMENT IS CONTRARY TO THE EVIDENCE AND LAW IN THE CASE AND THAT

SAME WAS NOT IN ACCORDANCE WITH THE VERDICT, FINDINGS, FACTS AND LAW.

In this brief for the purpose of brevity it is deemed advisable to discuss the above assignments of error under the same heading for the reason that the same facts are involved and the points raised by the assignments can be discussed and presented to the Court together more orderly and more clearly.

This Court in Fern Gold Mining Company vs. Murphy, 7 Fed. (2nd) 613, in response to the contention, as we understand it, that for an injury to a leg an employe could not be allowed greater compensation than for the loss of a leg, said: "We find no merit in the contention. It is obvious that an injury to a leg may be such as to cause total and permanent disability."

We believe that we comprehend the court's reasoning in that case and we do not attempt herein to refute the logic of that reasoning. In that case, however, the jury returned a verdict finding that as a result of his injuries the employe was totally and permanently disabled. Upon the hypothesis, we understand that this Court reached its decision that an employe might suffer total and permanent disability by an injury to a limb without the actual loss of the limb, and hence entitled to greater compensation.

In this case the jury did not make any findings on the question as to whether or not the injury

to the employe's hand was such as to cause total and permanent disability, but it did find that the injury to the employe's hand had diminished his earning capacity more than it would have if the hand had been completely severed between the wrist and the elbow, and also that thereby the employe had suffered a 65% loss of earning capacity.

The employe in this case originally claimed that his hand, by reason of the injury, had been totally and permanently disabled. (See par. IV COMPLAINT, page 2.) However, after all the evidence had been adduced and after the argument of counsel before the jury, the plaintiff, by his attorney, requested permission to and did amend his complaint by striking out the word "totally" and inserting in lieu thereof the word "partially." (PR pages 66-67.) The plaintiff thereby admitted that the injury to his hand had only resulted in a partial disability. Because of this admission no reference is needed to the evidence to support our contention that the plaintiff's hand, as a matter of fact, was only partially disabled.

Conceding only for the purpose of argument that this partial disability is permanent, we argue that a partial and permanent disability of a limb or other member of the human body cannot under any circumstances be equivalent to or exceed the loss of that limb or member. The very fact that the plaintiff considers that the injury is par-

tial of itself admits that he has not suffered a loss equivalent to the entire limb or member. If the disability is only partial, then it seems to us that there can be no question that there must be some ability left in the limb. There must be something that added to the partial disability makes the whole. That something must be partial ability of the limb, and the partial ability taken together with the partial disability makes the whole limb or member, and constitutes the entire physical condition of the whole limb or member. The record indisputably shows that the defendant in error still has the partial use of his hand, ie., he still had partial ability of the hand. (See P. R. pp. 34-35-36-37-42-43-46-47-48-49-50-51-52-53-54-55-56-57-58.)

Having partial ability still left in the hand, it is physically impossible for him to have suffered a loss equivalent to the loss of the entire hand. If the entire hand were gone, he would have no physical ability whatever in it. Of course, as stated by this Court in the case above referred to, he still could have the hand but have suffered such an injury to it that, although having the hand, he would have suffered total and permanent disability, because an injury totally and permanently disabling the hand itself might more greatly disable the remainder of the body in the use or non-use of the hand than the severance of the entire hand, but that could not fol-

low if he retains partial use or ability in the hand.

The Alaska Workmen's Compensation Law, so far as we can ascertain, contains no such provision as is contained in, we believe, many state statutes, to the substantial effect that permanent loss of the use of a member of the body shall be considered as the equivalent of the loss of such member. Such a provision was under discussion in the case of Pater vs. Superior Steel Co., 105 Atlantic (Penn.), 202. Such provisions, when inserted in a statute, are done so for the purpose, we submit, of assuring the employe that, for an injury resulting in such permanent loss of the use of such member, he will receive compensation equivalent to what he would receive had he sustained the loss of such member; and not for the purpose of assuring the employer that for such an injury the employe will receive no more compensation than he would receive for the loss of a member. The object of such statutory provisions is to overcome the effect of decisions holding that the loss of the use of a member is not equivalent to the loss of the member.

To more clearly illustrate our point we will refer to the case of the Yukon Mill & Grain Co. vs. Evers, 245 Pac. (Okla.), 549, where, under the Oklahoma statute, the court held that the permanent partial loss of the employe's hand was not equivalent to the total loss of the hand; also to

the case of Packer vs. Olds Motor Works, et al., 162 N. W. (Mich.), 80, where, under the Michigan statute, the court held that the loss of a part of a phalange was not equal to the loss of the entire phalange, and to the case of Adonites vs. Royal Furniture Company, 162 N. W. (Mich.), 965, where, under the Michigan statute, the Court held that the loss of the use of the thumb was not equal to the total loss of the thumb.

Inasmuch as the Alaskan statute does not contain such provision, we therefore submit that both logic and the analogous decisions, whethe directly or indirectly bearing upon the proposition, support our contention that the partial permanent disability of a hand is not equivalent to the loss of the hand itself.

The Alaska Statute contains specific schedule relative to loss of members of the body, ie.,

"Where any employee received an injury arising out of, or in the course of, his or her employment resulting in his or her partial disability, he or she shall be paid in accordance with the following schedule:"

The statute then specifically schedules the amount of compensation to be paid for the loss of various members, and provides, among other things, that (Alaska Session Laws 1923 Chapter 98 pages 239-240).

"For the Loss of a Hand:

(a) In case the employee was at the time of the injury unmarried, $1,872.00.

(b) In case the employee was married but had no children, $2,496.00.

(c) In case the employee was either married or a widower and had one child, $2,496.00 and $312.00 additional for each of said children, not to exceed, however, the total sum of $3,120.00.

For the Loss of an Arm:

(a) In case that the employe was at the time of the injury, unmarried, $2,340.00.

(b) In case the employe was married but had no children, $3,120.00.

(c) In case the employe was neither married or a widower and had one child, $3,120.00 and $390.00 additional for each additional child, the total amount not to exceed, however, $3,900."

The loss of any such member is thus specifically defined as being a partial disability and, as the loss of any such member must physically be permanent, necessarily such disability is not only partial but also permanent. It logically follows that if an injury results only in a partial, even though permanent, disability to such a member that the employe is not entitled to receive any greater compensation than if he had sustained the entire loss of such member.

If it be true that, for the partial permanent disability to a hand, a greater compensation may be allowed than that that could be allowed for the total permanent loss of the hand, then it is also true that, if an employe should receive a partial permanent injury to a finger, there is no reason why he could not recover for such partial and

permanent loss of a finger, the same compensation as the employe recovered in this case. This conclusively follows because, if the partial permanent disability of a member warrants compensation greater than the loss of the member, then there is no criterion as to the amount to be paid other than, as we shall hereinafter show, the maximum of $6240.00.

The compensation which the employe was entitled to recover in this case was $3120.00 for the entire loss or severance of the hand, and we submit that the evidence shows that the employer acted in extremely good faith when in its answer (see PR page 7-8) it offered to pay 75% of the loss of the hand. The jury itself found that the employe had suffered only a 65% decrease in his earning capacity.

While there is some testimony that the arm of the employe had sustained some atrophy in the right arm, yet it will be noted that the plaintiff himself confines his claim solely to injury to his right hand. (Complaint par. V.) Had he wished to urge an injury to the arm, he ought to have pleaded it. Very apparently he does not claim an injury to the arm, and equally apparently is the absence of any right on his part to claim it at this time. By the statute above quoted it will be noted that had he claimed the loss of his right arm, the total amount of his recovery could not have exceeded $3,900.00. The court, however,

took the position that this injury came within the provisions of that section of the Alaska Workmen's Compensation Act reading as follows: (Bottom of page 241 and top of page 242, Chapter 98, Sessions Laws of Alaska, 1923.)

"Whenever such employee received an injury, arising out of and in the course of employment, as a result of which he or she is partially disabled, and the disability so received is such to be permanent in character and such as not to come wholly within any of the specific cases for which provision is herein made, such employee shall be entitled to receive as compensation a sum which bears the same relation to the amount he or she would be entitled to receive hereunder if he or she were totally and permanently disabled that the loss of earning capacity of such employee, by reason of the accident, bears to the earning capacity such employee would have had had he or she not been injured, the amount to be paid in no case to exceed Six Thousand Two Hundred Forty Dollars ($6,240.00)."

There are many injuries which might arise for which there are no specific provisions; for instance, broken ribs; occupational diseases; mouth, stomach and spine injuries; injuries to head other than eyes, ears and nose, etc. It is such unprovided for injuries that this section of the statute is intended to cover. We submit that, even though this statutory provision might be construed to cover the case where a man suffers the loss of a hand and at the same time also suffers additional injuries which increased his disability more than the injury to the hand itself

would, that such construction would not permit the distortion of this section of the statute to such an extent as to entitle an employe who sustains only a partial injury to a hand, even if some of the arm muscles are atrophied, to greater compensation than though he had lost the entire hand or the entire arm. If such be the law, then if an employe sufferd an injury to a toe, for the actual loss of which, other than the great toe, the compensation is $156.00, he could maintain a claim for compensation in an amount equal to or greater than the amount which he would be entitled to if he had lost both hands, or both arms, or both feet, or both legs, or both eyes, or any two thereof, because, if he were unmarried and had no children, nor father, nor mother dependent upon him, his compensation for such total disability would be $4,680.00, as provided in the following paragraph: (Par. (e) page 239, Chapter 98 of the Alaska Session Laws of 1923.)

"(e) In those cases where such employee so injured at the time of his injury was unmarried and had no children nor father nor mother dependent upon him, he shall receive the sum of Four Thousand Six Hundred Eighty Dollars ($4,680.00)."

Where as he could avoid the limitations of that section and maintain his claim in accordance with the paragraphs above quoted from pages 241 and 242, to which there is no limitation as to

the amount of recovery other than the maximum amount of $6,240.00.

We believe that this Court expressly sustained our contention, that the employe was not entitled to recover under any circumstances more than $3120.00 in this case, when it stated in Fern Gold Mining Company vs. Murphy, Supra, that:

"The legislature of Alaska, in prescribing $1800 for the loss of a leg, had in mind the case of the loss or amputation of a leg involving only a partial disability and the statute expressly so states."

In that case this court approvingly quoted the Connecticut Supreme Court in Saddlemeier vs. American Bridge Co., 110 A. (Conn.) 63, 68, as follows:

"When the loss of a leg in fact results in partial incapacity the provision for compensation for the loss of a leg applies. Where the loss of a leg in fact results in total incapacity, the provision for compensation for the loss of a leg does not apply."

The facts of the case at bar are not such as were said by the Kansas Supreme Court in Stefen vs. Red Star Mill & Elevator Co., 187 Pac. 861-862, to entitle the employe to receive additional compensation. The record shows no sign of *any additional injury to incrase the employe's partial disability other than the injury to the hand itself,* which disability is only partial.

It might be that, as stated by the Georgia Su-

preme Court in Georgia Casualty Company vs. Jones, 119 S. E. 721-723:

"If such specific injury were accompanied or followed by partial, permanent, or total disability due to some other cause, such as infection or paralysis and not to the mere loss of such member, whereby a super-added injury followed, the employee would not be entitled to additional compensation."

That particular point was not before the Georgia court for discussion, but, to us, it clearly states the true intent of the legislature in the Alaska Workman's Compensation Law, in which there is nothing that warrants greater compensation being paid for a partial, even though permanent, injury to a hand than for the loss of the hand itself.

We do not have the Nebraska statute before us but it apparently provides that the permanent loss of the use of a hand is equivalent to the loss of a hand. Can it be said that absence of such provision in the Alaskan statute warrants the employe's receiving greater compensation for the partial loss of the use of a hand, that is a partial disability of a hand, even though permanent, than for the complete loss of the hand.

In Schroeder vs. Holt, 204 N. W. (Neb.) 815, the Nebraska Supreme Court held that an employe, by reason of the injury, lost the use of the leg injured and was therefore entitled to compensation the same as if the leg by reason threof

had been amputated. The injury involved in that particular case was limited to the left leg. The evidence in this case clearly shows that the injury is limited to the right hand. The evidence is very clear on this point. See evidence of Carrothers pp. 44-45; Ellis pp. 48-49-52-53-54-55-56-57. Regardless of any dissimilarity between the Alaska and Nebraska statutes, we urge that where an injury is limited to the right hand, and that injury consists only of the loss of the partial use of that hand, an employe, under the Alaskan statute, is not entitled to more compensation than though he had lost the entire hand.

While in Close vs. Lucky O. K. Mining Co., 182 Pac. (Kan.) 392, the Kansas Supreme Court held that the loss of a leg might, in some instances, work less incapacity for earning wages than an injury thereto, yet it does not therefore necessarily follow that an injury to a hand does work greater incapacity for earning wages than the loss of the entire hand. That theory logically follows only when the injury was both total and permanent, because, if the injury was only partial, even though permanent, and there was no other injury affecting other parts of the employe's person, the employe necessarily must have some partial ability or use left in the hand, which clearly he could not have if the hand were entirely lost.

The rule laid down by the Kansas Supreme

Court, as announced in Snoposky vs. Home Riverside Coal Mines Co., 244 Pac. (Kan.) 849-850, is perhaps contrary to our contention, but it quite clearly appears from the Kansas case of Zwaduk vs. Morris & Co., 197 Pac. 868-869, that the Kansas statute provides a minimum compensation for a partial and permanent disability.

The Alaskan statute fixes no minimum compensation for a partial and permanent disability. If the partial and permanent disability does not affect the employe's earning capacity, then, at least so far as this particular provision of the statute is concerned (and there appears to be no other covering the situation), the employe would not be entitled to receive any compensation, because, the section above quoted (pages 241-242 Alaska Session Laws 1923) bases the recovery upon the percentage of loss of earning capacity sustained by the employe. If this is the law, then what is to prevent the employer in any case from setting up a defense to the employe's claim, no matter whether an employe has actually lost one or more member, that by reason of such loss of his members, he sustained no loss of his earning capacity? The result would, could, and undoubtedly does many times actually result.

Even as against the Kansas rule there was at one time a strong dissent as appears by the dissenting opinion in Emery vs. Cripes, 205 Pac. 598-600.

In Clark vs. Clearfield Opera House Company, 119 A. (Penn.) 136, the Court said that the injury was permanent but that it covered a wider area than, and extended beyond the leg proper, and that it was not denied that there was complete loss of the leg. Conceding such premise with respect to a permanent and total disability, we submit that regardless of what conclusion might follow from such premise, that it cannot be concluded that an employe is entitled under the Alaska statute to greater compensation for a permanent and partial disability to a hand than for the loss of the entire hand, which is, under the statute, a partial disability, and as we have seen, must also be a permanent disability. Moreover in this case, the partial and permanent disability is confined entirely to the hand itself. The injury did not extend to other parts of the employe's person.

In Blackford vs. Green, et al., 940 Atlantic (N. J.) 401, a workman's forearm and hand were impaired by an accident to the extent of 75% and his upper arm to the extent of 8%, the amount awarded was 75% of what the statute fixes for an arm. The Court held that this amount was not necessarily incongruous with the statutory provisions making amputation between the elbow and the wrist equivalent to the loss of a hand only.

In another New Jersey case the court held

that an award for a partial injury to the motion of the arm, of the same compensation as the statute fixes for the loss of the arm, is not in compliance with the statutory mandate that the compensation shall bear such relation to the amount stated in the schedule as the disabilities bear to those produced by the injuries named in the schedule. Barbour Flax Spinning Company vs. Haggerty, 89 Atlantic (N. J.) 919.

In Stoughton Wagon Company vs. Myre, 157, N. W. (Wis.) 523, a permanent loss of 4-5 of the eyesight was held entitled to 4-5 of the compensation allowed for total blindness.

The Workman's Compensation Law fixes the maximum amount to be paid in case of a partial and permanent disability, if the employe suffers the loss of earning capacity by such injury, to the sum of $6240.00 (see section quoted supra). The legislature in order to clearly illustrate just how such amount should be compiled, gave the following formula:

"Whenever such employee receives an injury, arising out of and in the course of employment, as a result of which he or she is partially disabled, and the disability so received is such as to be permanent in character and such as not to come wholly within any of the specific cases for which provision is herein made, such employee shall be entitled to receive as compensation a sum which bears the same relation to the amount he or she would be entitled to receive hereunder if he or she were totally and permanently dis-

abled that the loss of earning capacity of such employee, by reason of the accident, bears to the earning capacity such employee would have had had he or she not been injured, the amount to be paid in no case to exceed Six Thousand Two Hundred Forty Dollars ($6242.44).

To illustrate: If said employee were of a class that would entitle him or her to Six Thousand Two Hundred Forty Dollars ($6240.00) under this schedule, if he or she were totally and permanently disabled, and his or her injury would be such as to reduce his or her earning capacity twenty-five (25%) per cent, he or she would be entitled to receive One Thousand Five Hundred Sixty Dollars ($1,560.00), it being the amount that bears the same relation to Six Thousand Two Hundred Forty Dollars ($,240.00) that twenty-five (25%) per cent does to one hundred (100%) per cent. Should such employee receive an injury that would impair his or her earning capacity seventy-five (75%) per cent, he or she would be entitled to receive Four Thousand Six Hundred Eighty Dollars ($4,680.00), it being the amount that bears the same relation to Six Thousand Two Hundred Forty Dollars ($6,240.00) that seventy-five (75%) per cent does to one hundred (100%) per cent."

The plaintiff prayed for compensation in the sum of $6,240.00 (PR page 4), which is the maximum amount so fixed by the legislature.

The jury in their special verdict found that the employe's earning capacity had been diminished, by reason of the injury, 65%.

Computing the employe's compensation in accordance with the formula given by the legislature, 65% of $6,240.00 would amount to $4,056.00.

From this $4,056.00 rightly should be deducted the sum of $218, which admittedly was paid before the trial (PR page 75). The correct amount of the judgment, assuming but not conceding that the employe, for a partial and permanent disability to his hand, could receive a greater amount than for the entire loss of his hand, would therefore be $3,838.00.

The trial court in rendering the judgment apparently computed the amount by taking 65% of $7,800.00, which is $5,070.00. Deducting the $218.00, which was paid, from the $5,070.00, leaves $4,852.00, the amount of the judgment. This amount could have been reached only by erroneously basing the total amount that might be paid to an employe for a partial and permanent injury at $7,800.00.

The defendant in error, at the time of the injury having been married and having seven dependent children, undoubtedly would have been entitled, had he been totally and permanently disabled by the injury, to have received compensation in the sum of $7,800.00, because the statute provides:

"Where any such employee receiving an injury arising out of, and in the course of his or her employment, as the result of which he or she is totally and permanently disabled, he or she shall be entitled to receive compensation as follows:

"(a) If such employee was at the time of his

injury married he shall be entitled to receive Six thousand Two Hundred Forty Dollars ($6,240.00) with Seven Hundred Eighty Dollars ($780.00) additional for each child under age of Sixteen (16) years, but the total to be paid shall not exceed Seven Thousand Eight Hundred Dollars ($7,800.00)."

It is scarcely likely that the legislature would allow the same compensation for a partial and permanent disability as for a total and permanent disability. Certainly, if there were no specific provision on the subject, it would be contrary to all ideas of justice that an employe who is totally and permanently disabled should receive no more compensation than an employe who is only partially and permanently disabled. The whole theory of the compensation law very clearly shows the legislature's intent to scale the compensation so as to, at least roughly, accord with the gravity and severity of the injury.

The specific limitation upon the amount to be paid to an employe as compensation for partial and permanent disability is fixed at $6,240.00. The statute says specifically: "The amount to be paid in no case to exceed $6,240.00." Moreover, taking that maximum amount and applying to it the legislature's formula, the result will be reached for a 100% loss of earning capacity an employe who is only partially and permanently disabled is entitled to receive 100% of that amount, namely, 100% of $6,240.00. It is only fair and just, where an employe retains 35% of

his earning capacity, that he should not receive the same compensation that he would have received had he lost 100% of his earning capacity. The employe in this case retained 35% of his earning capacity. That conclusion necessarily follows from the jury's finding that he had lost 65% of his earning capacity.

VI.

THE COURT ERRED IN ENTERING ANY JUDGMENT AGAINST DEFENDANT IN ANY EVENT IN A GREATER SUM THAN FOUR THOUSAND FIFTY-SIX DOLLARS ($4,056.00) LESS THE SUM OF TWO HUNDRED EIGHTEEN DOLLARS ($218.00) PAID THE PLAINTIFF BY DEFENDANT.

The plaintiff under the verdict surely was not entitled under any circumstances to receive judgment for more than 65% of $6,240.00, the maximum amount allowed by the statute. As a matter of fact the Court in instructing the jury took as a basis that sum, $6,240.00, and surely when the jury made a finding of 65% loss of earning capacity the jury had in mind no other amount than $6,240.00. The statute is so clear on that point that we have not attempted nor do not cite authorities to sustain our contention. The judgment, therefore, in this case, under the circumstances should be modified and reduced to $3,838.00, namely 65% of $6,240.00 equals $4,-

056.00, from which should be deducted $218.00 paid, leaving $3,838.00.

CONCLUSION.

It is respectfully submitted in conclusion that the case should be reversed and a new trial ordered for the reasons:

(a) Of the error committed by the Court in the admission of the evidence referring to the negligence of the defndant.

(b) For the failure of the Court to grant an instructed verdict on account of the failure to support the complaint, and

(c) The permission of the Court to amend the complaint after the case had been tried and the arguments completed.

And we further respectfully submit that if the points above mentioned in the view of this Court are not well taken that the verdict should be set aside and a new trial granted for the reasons:

(a) That plaintiff has been permitted to receive judgment for more than if his hand had been completely severed, which is not the intention of the Alaska Compensation Act.

(b) That the judgment should be modified and reduced to the sum of $3,838.00, which amount is 65% of $6,240.00 less the sum of $218.00 already received by the plaintiff at the time of the trial.

Respectfully submitted,

A. H. ZIEGLER,

Attorney for Defendant.